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VIEWING LESSEE AS OWNER INSTEAD OF CONTRACTOR UNDER MECHANICS' LIEN STATUTE.

In McNulty Bros. v. Offeman, 116 N. E. 775, decided by New York Court of Appeals, there were claims by lienors on real estate where the indebtedness arose out of contracts made by a tenant with material men for the improvement of real estate.

In this case there was a lease and in it there was provision in general terms for various improvements, to the making of which the landlord agreed to contribute $15,000, provided the tenant paid his rent promptly before the bills fell due.

The tenant did not keep his engagement about paying rent and he proceeded to do many things which could not by any liberality of construction of the terms of the lease be included therein. The tenant became embarrassed and unable to pay for the improvements, and the question came up whether the claimants had only such a lien as they would have had against a contractor, or, if the relation of landlord and tenant, made of the latter, for this purpose, an owner.

The court said:

"The lienors take the position that restrictions applicable to those dealing with a contractor do not fit the situation. They say that landlord and tenant are alike owners, though of different estates or interests (Lien Law, § 2), and that when the landlord consents to improvements by the tenant, the relation which arises is that of joint proprietors rather than principal and contractor. They say that a lien is given to one who performs labor or furnishes materials for the improvement of real property with the consent or at the request of the owner thereof' (Lien Law, § 3); and they find in the covenants of this lease a consent which charges a lien upon every interest in the land. If the tenant is in the position of a contractor, and materialmen are merely subrogated to his rights, his default destroys the liens. Lien Law, § 4; Van Clief v. Van Vechten, 130 N. Y. 571, 29 N. E. 1017. If the liens depend upon the consent of joint proprietors to the improvement of the joint property, or at least upon some kindred principle, they have been properly established and properly enforced."

The court considered that the tenant in making the improvements was not a contractor, and if from any instrument giving him the right to authorize improvements, thereby he pledges as owner the property improved just as the actual owner could.

It was said as to this tenant that:

"His position does not differ in essence from that of a tenant in common who has improved the common property upon a promise by his cotenant of equitable reimbursement. The statute, when it speaks of contractors, intends to reach another class. Joint proprietors, improving their joint estate, may contract between themselves as they please for the division or apportionment of expense, but their relation to materialmen and laborers remains unchanged. In their relation to lienors they remain owners and not contractors. When we speak of joint proprietors we use the word in the largest sense. Tenants in common, lessor and lessee, vendor and purchaser, all have interests in the land; but when once they have given their consent to an improvement, they cannot, by any arrangement among themselves, cut off the rights of lienors. Miller v. Mead, 127 N. Y. 544, 548, 28 N. E. 387, 13 L. R. A. 701; Wahle Phillips Co. v. German Theater, Inc., 153 App. Div. 17, 138 N. Y. Supp. 13; Id., 214 N. Y. 684, 108 N. E. 1110. The consent once given, the lien attaches under the law."

After all, however, it seems to us that there was little reason for trying to place the ruling on any such technical lines as the court followed. The common sense way of looking at the matter was a fair consideration of the blanket authority granted to the tenant to direct the making of the improvements. After all said

and done, the court gave to the lease much latitude as to what it fairly embraced. In this there was a sort of contract of agency going somewhat beyond what the law spells out in the relationship between owner and contractor in the making of improvements on property. At bottom, in rejecting what was not done under scope of authority in the lease, the court followed the rule of principal and agent, and to call it that instead of elaborating some theory of "joint proprietorship"—a tenancy in common—is better in business understanding.

NOTES OF IMPORTANT DECISIONS.

DAMAGES — MENTAL SUFFERING IN PRE-NATAL INJURY.—In Gagnon v. Rhode Island Co., 101 Atl. 104, the Supreme Court of Rhode Island considers elements of damage in a case where a pregnant woman suffered injury to the foetus in her womb and a child being born deformed.

The trial court instructed the jury that the mother was not entitled to compensation for the injury to the child, or for any disappointment and suffering which she, as its mother, might feel during its life by reason of any deformity in the child, but they would be justified in giving compensation which they might find she had endured before the birth from apprehension of deformity to the child, and also for any suffering at the time of birth by disappointment in finding her apprehensions realized.

The court, in discusion, said: "The foetus is a part of the person of a pregnant woman, and if by reason of the nature and circumstances of an injury to her person caused by the negligence of a defendant, she suffers apprehension and anxiety as to the effect of the injury upon the foetus, in accordance with the well-recognized rule, such mental suffering becomes an element of her damage as a natural and proximate result of the negligence which caused the injury. Furthermore, although she should not be given damages for the child's misfortune during life resulting from an injury to the foetus, nor for her own subsequent mental distress during the lifetime of the child, occasioned by its deformity, the mother is entitled to damages for her distress and disappointment at the time of the birth, because through the defendant's negligence she has been deprived of the right and the satisfaction of bearing a sound child, if it be found the child's deformity is due to the injury she received through the defendant's negligence."

The latter paragraph quoted appears at outs with the former, and it would seem, that if any damage for disappointment can survive the foetus ceasing to be a part of the mother, this could extend to its life of deformity. The rule the court announces is very uncertain. If the disappointment is only for a moment of time, it might be the damage would be very small. If it is extended to a day or two days, it would seem capable of extension to the minority period of a child's existence. If the technical rule the court announces of foetus being a part of the mother is to be enforced, it ought to be enforced in a technical way. Here it is noticed that nothing is said as to the right of the child to recover, but we suppose that would be absolutely cut out by the rule above spoken of.

LANDLORD AND TENANT—RE-LETTING AS ACCEPTANCE OF SURRENDER.—In McGinn v. B. H. Gladding D. G. Co., 101 Atl. 129, decided by Rhode Island Supreme Court, the facts show, that after lease had been executed and possession taken of the premises the lessee mailed the key by registered letter to lessor and afterwards, during the term, lessor let the premises to a third party and demanded rent less the amount received on the re-letting.

The court disposing of questions relating to claimed conditional letting adversely to lessee, and among them that the sending of the key did not amount to a surrender, then discusses the question whether or not an attempted surrender was accepted by the landlord as a complete surrender. Discussing many cases pro and con, the court rules that the re-letting being without any knowledge on lessee's part amounted to an accepted surrender.

Plaintiff cites many cases to the effect that it did not amount to such surrender. See Biggs v. Stueler, 93 Md. 100, 48 Atl. 727; Oldewortel v. Wiesenfeld, 97 Md. 165, 54 Atl. 969; Alsup v. Banks, 68 Miss. 664, 9 So. 895, 13 L. R. A. 598, 24 Am. St. Rep. 294; Higgins v. Street, 19 Okla. 45, 92 Pac. 153, 13 L. R. A. (N. S.) 398, 14 Ann. Cas. 1086. But these cases are generally distinguished by the court saying there was express refusal to accept the surrender,

and there was no claim for any time except when the property was wholly vacant.

The court summarizes the cases as follows: "In the examination of the many cases cited, we have found some confusion and conflict of authority upon the question whether the re-letting by the landlord after abandonment by the tenant amounts to an acceptance of surrender as a matter of law. As above shown w have found only two cases where it has been baldly held that the landlord, after refusing to accept a surrender, can, as a matter of right, without notice to the lessee, or without his assent, either express or implied, re-let the premises for the account and risk of the lessee and can hold the lessee for the loss, if any. In all the other cases cited by plaintiff, above referred to, it either appears that the landlord gave notice of his intention to re-let for account of the lessee or at his risk, or that there was an assent either express or implied on the part of the lessee that such re-letting could be made for his benefit and on his account or at his risk. We find, therefore, that the weight of authority, so far as the facts of the case at bar are concerned, is to the effect that the re-letting to a third party by the plaintiff without notice to the defendant, without knowledge on its part or without its assent, operated as an acceptance of the surrender by the defendant from and after September 1, 1907, and that after that date the defendant was no longer bound by the lease."

This ruling at most only declares, that the lessee may be held though the premises are re-let, if he be notified that they will be re-let on his account. This seems little enough to require of the lessor, but why could it not be assumed, if the purpose was plain that lessee claimed a surrender, that he could have no objection to a re-letting? Is there not compulsion of a technicality in favor of one plainly attempting to shirk an obligation?

HUSBAND AND WIFE—RENT OF FAMILY HOME AS CREATING JOINT LIABILITY.—In Lewis v. France, 163 N. W. 656, decided by Minnesota Supreme Court, the question ruled was whether rental of a house occupied as the family home created joint liability on husband and wife under a statute making them jointly and severally liable "for all necessary household articles and supplies furnished to and used by the family." It was held it did not.

In its opinion the court refers to an Illinois decision where wife was held liable under a statute creating liability for 'the expenses of the family and of the education of the children." Illingworth v. Hill, 33 Ill. App. 394. To the same effect is Straight v. McKay, 15 Colo. App. 60, 60 Pac. 1106.

Missouri court has held as does the instant case under a statute making the wife's separate property liable "for any debt or liability of her husband created for necessaries for the wife or family."

It appears to us that statutes of this kind apply rather to daily transactions where there is less formality involved than in that between landlord and tenant. This contemplates a long period, often evidenced by solemn instruments and it should be very clear, indeed, that this is contemplated before being carried into this class of statutes. Furthermore, these contracts are frequently required to be secured and where they are not there is election to trust personally the lessee. Furthermore, there are particular remedies given lessors and landlords which ordinary creditors do not possess.

REASONABLENESS AND LEGAL RIGHT OF THE MINIMUM CHARGE IN PUBLIC UTILITY SERVICES.

The law of public utilities is raising new problems for solution and coining new words and phrases for court construction.

In a little booklet by Samuel S. Wyer[1] on the subject of this article, the author, a consulting engineer, seeks to enlighten the courts on the two terms now so frequently used, to-wit: "Readiness-to-serve Charge," and "Minimum Charge."

The term, "minimum charge," as used in public utility rate parlance, means, according to Mr. Wyer, "merely the minimum monthly bill which will be rendered, which includes a certain definite number of units of public utility service. The consumer, however, pays the entire minimum bill, regardless of whether or not he has used the number of units of public utility service that go with the minimum bill charge."

The term, "readiness-to-serve charge," is, according to Mr. Wyer, "a form of min-

(1) Published by George G. Ramsdell, New York City, 29 W. 39th St.

imum charge made to cover the costs incurred by the utility in holding itself in constant readiness to render service, without, however, delivering any units of *service*. The actual units of service (such as kilowatt hours of electric energy, cubic feet of gas, gallons of water, or number of messages) used are paid for by an additional rate schedule."

In other words, a readiness-to-serve charge is made simply for service rendered. The minimum bill charge is a combination charge for service rendered and a certain number of units sold.

The term "meter rental" is another term which needs careful definition. It is to be defined, according to Mr. Wyer, as "rental for equipment which the utility is under obligation to furnish the customer, and the rental is added to the bill regardless of the monthly service consumption. It is wrong in principle and cannot legally be enforced."

It is now admitted in all sciences that progress is simply a matter of exact definitions and accurate distinctions. If that be true, we can well imagine that failure on the part of courts and public service commissions to distinguish accurately between the terms "readiness-to-serve," "minimum charge" and "meter rental," has been the cause of much confusion and some unsound decisions from judicial bodies.

That the public is more familiar with the term "minimum charge" than with the term "readiness-to-serve" is probably due to the public's contact, for many years, with the "minimum weight" and "minimum charge" features in railroad and express company schedules, and more recently on the parcels post. Practically all telephone schedules also are on a minimum charge basis, and this has helped to familiarize the public with this style of charging, rather than the straight readiness-to-serve charge, which is newer.

The term "minimum charge" has been often defined by the courts, probably, however, not always with scientific accuracy. But if the courts have failed to make the distinctions noted by Mr. Wyer, it is probably due to the fact that the courts have never had the benefit of the advice of men specially trained in the regulation of public utility rates.

One of the earliest decisions sustaining a minimum charge was that of the Missouri Appellate Court in 1889, in the case of State ex rel. v. Sedalia Gas Light Company,[2] in which case the court said:

"The evident purpose of this rule was to exact fair compensation from those requiring gas connection, and gas furnished at hand, though the amount consumed should be very small, almost nominal. We think it is not unjust or unreasonable. It is a matter of common knowledge, that to furnish gas at hand for a very small or nominal consumer, requires the same outlay in the way of a meter, periodical inspection and repairs, with weekly or monthly visitations, that is required of very large consumers. The same investment, and the same care and oversight, is required where the gas monthly consumed shall not exceed 10 cubic feet, or even 1 cubic foot, or where the amount used may be 10,000 cubic feet. At the rate then charged in Sedalia * * * the gas company would be required to invest and expend, for the benefit of this merely nominal consumer, more dollars than cents received. * * * We hold, then that the rule or regulation in question, * * * is not as a matter of law unreasonable."

In a more recent decision by the New York Supreme Court in the case of Gould v. Edison Electric Illuminating Co.,[3] it was said:

"The law does not contemplate that the defendant shall do business at a loss. It is expected that it will, and it is entitled to, make a reasonable profit on its venture, and the sole question in such a case as this is whether the charge made is unreasonable, considering all that the defendant is required to do, to meet each customer's demand. * * * The customer does not bind himself to use any particular amount of light, so the return to the company, based on actual consumption, would rest entirely

(3) 60 N. Y. Supp. 559.
(2) 34 Mo. App. 501.

on his volition, and it would, therefore, depend on him whether the service he has required the corporation to be in constant and immediate readiness to render, is profitable or unprofitable to the latter. But this constant condition of readiness is a necessary and unavoidable obligation which must be sustained in order to meet instantaneously the demand for light, which the consumer is entitled to have at any moment that he wishes it. It thus forms a part of the service to be rendered, and is an item properly to be considered when the reasonablenses of the charges exacted by the company is called in question. * * * They are free to exact a reasonable return for the service required, which includes, as I have said, not only the actual supply of electric light, but the readiness to supply it. * * * One consumer with the same number of lamps will use more than another. In both cases the return to the company may be remunerative, or the use of one may be so inconsiderable as to involve a loss. To meet this contingency the monthly minimum charge of $1.50 is made. But it must be borne in mind that this payment is not in addition to the charge for actual consumption. Where light is used which entitled the company to payment on meter measurement, of a sum per month equal to, or in excess of the so-called minimum charge, the customer pays only for the light he has actually had; so that this fixed charge becomes practically operative only where his consumption falls below the extent of the use which it measures. I can see nothing unreasonable in this, when the service, as I have defined it, which the company is obliged to render, is considered."

A popular fallacy regarding the readiness-to-serve expense is that it is limited to merely the meter or service line. This, however, is far from the truth. The readiness-to-serve feature embraces the entire plant, and extends back through the entire public utility organization. Thus, in natural gas plants the reserve acreage, that is carried to insure continuous service in the future, and to replace the ever-vanishing supply, is as much an integral part of the readiness-to-serve feature as is the domestic meter through which the company finally markets the gas to the ultimate consumer. Even if the natural gas company does not carry the acreage direct, the readiness-to-serve feature will be reflected in the price that the natural gas company must pay for gas in the field.

In this connection it is interesting to note Mr. Wyer's suggestion that "continuity of service is a vital feature in the readiness-to-serve expense." The public utility plant, according to Mr. Wyer, "must not only be maintained in readiness-to-serve, but must be capable of rendering service every hour of the day, and every day of the year, ever ready to meet the consumers' caprice in using or not using its service. This feature is, of course, especially marked in electric, water and gas utilities."

It is sometimes said that a minimum charge is a discrimination against small consumers, and this argument is often addressed at the present time to public service commissions. The New Jersey Commission[4] answered this contention very effectively when it declared:

"It is undoubtedly true that the exaction of a minimum charge will result in an apparent hardship to a small number of consumers who use their equipment but a very short time, in some cases not more than four or five hours per month. The fact must not be lost sight of, however, that the supply of electric power is strictly a commercial proposition, and to relieve one customer from the payment of any considerable portion of the costs would merely result in transferring the burden to other customers, and such a transfer does not appear to be justified."

The "poor man" argument is often overworked. Most poor men do not wish to be considered objects of charity, and we are therefore inclined to agree with Mr. Wyer when he declares that "no ethical grounds, sociological motives, or legal obligations can justify the rendering of public utility service to the so-called poorer people of the community at a price, or on a basis, that makes others pay for their service."

(4) 1 N. J. Pub. Utility Com. Rep., p. 620.

In this connection it should be borne in mind, as Mr. Wyer suggests, that the terms "small consumer" and "poor man" are frequently erroneously used synonymously.

One difficulty in fixing a minimum charge is in distributing the actual cost to the company of being in readiness-to-serve, and the amount of service used within the minimum charge. Accurately speaking, the public utility, like an electric light company, for instance, should charge a fixed amount as a readiness-to-serve charge and then charge also for whatever electricity is used, be it great or small. But the companies prefer to combine the charge for minimum service with a readiness-to-serve charge, and this practice, for practical purposes, is now generally allowed by public service commissions. The New Hampshire Public Service Commission[5] in a recent case approving this method of rate-making, said:

"Either the minimum bill must be made sufficiently large to cover the use of gas through meters affected by the minimum bill, or the utilities must charge for gas used in addition to the minimum charge. This latter course is not deemed practicable. Accordingly, we have aimed to construct a schedule of minimum charges which shall recognize the varying investment in meters and services, and shall be sufficient to pay the consumer costs shown in the above tables, and to pay as well for the average quantity of gas used by meters affected by the minimum."

The case of the transient "summer cottwo or three months out of the year, he utility commissions. Using his property tager" gives much trouble to the public charge for the other nine months. But the public service commissions usually give him the option of paying the minimum charge or of discontinuing and paying annually a recurring connecting charge. A case of this kind came before the California Commission on an application by the West Coast Gas Company for the establishment of a minimum rate for gas furnished to summer cottages at Newport Beach. In an opinion favoring the application, filed September 10, 1914, the Commission said:

"It appears that in a portion of the territory served by applicant, particularly at Newport Beach, a large proportion of applicant's customers own cottages, which are occupied during two or three months in the summer, and that during the remaining portion of the year they are occupied only occasionally or not at all. The owners of these cottages object to paying a minimum of $1.00 during the entire twelve months.

"However, applicant's plant must be maintained in readiness to serve during the entire year, and applicant's investment is tied up and its system depreciates during the entire twelve months. Hence it seems only fair that as long as applicant's customers remained connected to applicant's system that they should pay a reasonable minimum monthly. Applicant must be ready to serve at a moment's notice every customer who is connected to system, and a proper proportion of the depreciation is fairly chargeable to each customer. The sum of $1.00 per month is a usual minimum charge for gas. I see no reason why it should not apply to applicant, provided that its customers understand that they have the right to have their service discontinued at any time and thus avoid the further payment of any minimum until the premises are again connected. A fee of $1.00 is reasonable for again making the service connection."

The object of the minimum charge is therefore not arbitrary, but reasonable, and is intended to cover expense that in the ordinary rate schedules cannot be covered in any other way. Its main purpose is rather to make it certain that each customer bears his share of the expenses incurred in supplying service. It is not a penalty for a failure to use service, "but is properly to be regarded as compensation for that part of the service which is at all times being rendered in the maintenance of the apparatus and connection through which the service is made available."

ALEXANDER H. ROBBINS.

St. Louis, Mo.

(5) Pillsbury v. People's Gas Light Co., N. H. P. S. C., p. 445.

A POOR MAN'S RECEIVERSHIP—DISCUSSING A NEW NEBRASKA STATUTE.

At the recent session of the Nebraska legislature there was passed an act which is believed to be original of its kind.

For some time merchants have complained of the bankruptcy law because so many debtors, owing an aggregate of not more than three or four hundred dollars, have taken advantage of it and thereby preventing the creditors from getting anything on their claims. This has occurred more frequently in the case of laboring men or others doing business in a very small way. Many of these persons would have paid their debts in full if they could have done so without being tormented by collectors, or penalized by costs in suits commenced and prosecuted against them by their numerous creditors.

The author of this law believed that if a method was provided whereby the debtor could pay his debts, under the protection of the court, free from annoyance and additional expense, many persons who would otherwise go through bankruptcy, would pay their debts in full.

The law provides that any person owing not less than $50 and not more than $1,000.00, to not less than three creditors, may file a petition in court, containing a sworn statement showing the names and addresses and the amount due to each of his creditors. It is then the duty of the clerk of the court to send, by registered mail, a notice to each of such creditors of the date on which the hearing will be had on the petition. At the hearing, evidence may be offered as to the correctness of any of the amounts. The court shall then enter a judgment in favor of each creditor and against the debtor for the amount found due such creditor.

Provision is made for bringing in creditors who have not been included in the original petition.

At the hearing the court shall take evidence as to what property the debtor owns and what amounts of income are available to him; also how many persons are dependent on the debtor for support. All of these findings are entered in the docket. The court shall then enter an order directing the debtor to pay to the clerk of the court monthly or weekly such sum as, in the judgment of the court, should be paid by the debtor on his indebtedness. It is made the duty of the debtor to make these payments and upon failure to obey the order of the court he forfeits the benefit of the exemption laws of the state.

Any suit pending or proceeding in attachment, aid of execution or otherwise, against the debtor shall be held in abeyance, after the filing of the petition by the debtor, so long as he complies with the order of the court.

Provision is made for modifying the order of the court upon the application of any party interested, at any time. The clerk is directed to distribute the money paid in among the creditors from time to time and when the debtor has paid the judgment in full he shall be released from all obligation to the creditors who were made parties to the action.

The law does not go into effect until July 24th, so no opportunity has been had to observe its operation. However, it is hoped that it will be a mutual benefit to the debtor and the creditor. Most workingmen want to pay their debts and will do so if given an opportunity. If this law gives them that opportunity and at the same time holds them harmless from collectors and constables it will justify its existence. Many creditors lose a large sum, in the aggregate, each year from debtors who go through bankruptcy, or change and conceal their whereabouts to avoid the annoyance and expense of suits on claims which they have been unable to pay in full during any one week or month. It will be more profitable to the creditor to receive his

money slowly under this law than to lose it entirely as under the old system.

No doubt some defects will develop in the law and changes will have to be made at the next session of the legislature. However, all real reform is the result of slow growth, and it is hoped that this law is the beginning of real reform for both the debtor and creditors. J. P. PALMER.

Omaha, Neb.

MASTER AND SERVANT—LIABILITY.

PHILLIPS v. WESTERN UNION TELEGRAPH CO. et al.

Supreme Court of Missouri. In Banc. May 22, 1917.

195 S. W. 711.

Where defendant telegraph company's messenger deviated slightly from his course, snatched a newspaper from a newsboy, and while running away collided with plaintiff, defendant was not liable, since it is not bound to regulate its messenger's speed on the public streets.

BROWN, C. This is a suit for damages suffered by plaintiff under the following circumstances: The defendant, Western Union Telegraph Company, is a New York corporation engaged in the business of receiving, transmitting, and delivering communications by telegraph between different places in the United States, including the City of St. Louis, in which it had offices for that purpose, among which was an office on the southwest corner of Olive street and Grand avenue. Olive street, at that place, extends east and west, while Grand avenue crosses it, extending north and south. The defendant, Kenzell, at the time of the injury, which occurred about December 28, 1912, was a messenger boy, 16 years old, in its service, whose duty it was to deliver telegrams. The evidence tends to show that about 7 o'clock in the evening of that day the plaintiff was standing on Grand avenue in front of the show window of a candy store on the southeast corner, waiting for an approaching automobile to pass, so that she could step down into the street and cross to the southwest corner, on which the telegraph office was situated. A newsboy with a bundle of papers under his arm, stood on the sidewalk, about 7 feet north of her, when the defendant, Kenzell, came running from the east along the sidewalk on the south side of Olive street, with a telegram in his hand, and said to the newsboy, "Give me a paper." The newsboy refused, when Kenzell snatched one from the bundle and ran, looking over his shoulder, collided with plaintiff with such force that she was knocked ten feet into Grand avenue and very seriously injured. There was a verdict and judgment for $10,000 against both defendants, from which the telegraph company alone has taken this appeal. It does not complain of the amount, but does strenuously insist that it is not liable upon the facts as above stated, and this is the point to which our attention will be given.

In going into the consideration of this case it is well to have in mind that the boy who caused the injury which is the subject of the suit, was not traveling on the street by permission of his co-defendant, but in the exercise of a public right, valuable to himself as a facility for gaining a livelihood, as well as to his employer. Had he not possessed this right his employer could not have conferred it nor taken it away. It went with his service as far as it was necessary to the performance of the duty involved, and no further. In all other respects and for all other purposes it remained his own. It was, like his health and strength, a part of his own equipment for the service in which he was engaged. We cannot arbitrarily assume that by the terms of his employment he was forbdden to seek, while on these trips, his own pleasure or profit in any manner consistent with the performance of his whole conventional duty, nor was the defendant under any obligation to so restrain his liberty of action, in the ordinary use of the public easement, although, should it authorize him to commit a wrong, as by inciting him to dangerous speed in a crowd, it would be liable for the consequences upon familiar principles unconnected with any issue in this case, and having no connection with the relation of master and servant.

On the other hand, neither beasts nor inanimate things participate in these public uses of their own right, but only have status in the public highway by right of their owners. For this reason one who employs a beast upon the street must do so under such management and control as will provide reasonably for the safety of persons and their property. Had this boy been furnished by the defendant with a horse to ride or an automobile to transport him in the performance of his duties, his management of these facilities would have

been the management of his master, which would have been liable for his acts and omissions in such management.

These principles are familiar to all, and are firmly embedded in the foundation in our jurisprudence, and we would not feel that it is necessary to mention them, were it not that this unfortunate accident has already been the subject of adjudication by an appellate court of this state in a suit brought by the husband of plaintiff (Phillips v. Western Union Telegraph Co. et al., 184 S. W. 958), in which the liability of the appellant was upheld. While this does not constitute an adjudication of the right in favor of this respondent, it is persuasive authority as the decision by a distinguished court of the same question, and is the only authority to which counsel has directed our attention bearing upon the question which seems to us to be the controlling one in this case.

Respondent's counsel meets these simple rules with the proposition that human legs, while safe and proper instruments of transportation when carefully used, are, like automobiles and other things of a similar nature, dangerous when used negligently, and that the master has as much control over the legs of his servant as over his own animal or machine; and cites Ryan v. Keane, 211 Mass. 543, 98 N. E. 590, 47 L. R. A. (N. S.) 142, as an authority, and the same case is cited and quoted by the St. Louis Court of Appeals in Phillips v. Western Union Telegraph Co., supra. In the Massachusetts case the accident occurred in the stable yard of a livery, in which a customer waiting for a conveyance he had ordered was roughly pushed, run against, and injured, by the employe who had been serving him, and who was on foot. We do not see the relevancy of this case, in which the employer failed in the duty of protecting his customer from negligent injury by his own servant upon his own premises to which he had been invited, to the duty of the master to control the movements of his messenger while walking upon the public street.

The respondent has also cited the decision of this court in banc in Maniaci v. Interurban Express Co., 266 Mo. 633, 182 S. W. 981. In that case the defendant express company had in charge of its office and business at Edwardsville, Ill., one Joiner, "a person of violent temper, quarrelsome disposition and without control over his passions" and "a dangerous and unfit person to place in such a position," which it well knew; a dispute had arisen between Joiner and plaintiff over the refusal of plaintiff to sign a receipt for a consignment of fruit previously delivered to him, and Joiner had telephoned him to come to the office, and while he was doing so, intercepted him, presented the receipt, demanded that he sign it, and while he was doing so "under protest," shot him. In holding the express company liable under the circumstances, this court said:

"The plaintiff was there upon the invitation of defendant for a legitimate purpose. He and Joiner were in the midst of the very business which had called them together, at the time said shooting occurred. In addition thereto, the petition alleges that plaintiff was in the very act of signing the receipt when he was suddenly shot."

It also cited a number of authorities sustaining the principle clearly stated by Judge Cooley (Cooley on Torts, 3d Ed., § 625) as follows:

"The master is liable for the acts of his servant, not only when they are directed by him, but also when the scope of his employment or trust is such that he has been left at liberty to do, while pursuing or attempting to discharge it, the injurious act complained of. It is not merely for the wrongful acts he was directed to do, but the wrongful acts he was suffered to do, that the master must respond."

There is nothing in any of these authorities which applies the doctrine of respondeat superior, or the principles on which it rests, to the facts of this case as already stated, and we are not surprised that the diligent search indicated by the briefs of eminent counsel in this case have failed to disclose one. Had the messenger boy, charged as the direct perpetrator of the injury to plaintiff, been charged by the telegraph company with the duty of delivering a telegram to her and taking a receipt therefor, and he had presented it and demanded the receipt, and had a quarrel arisen between them as to the proper method of executing it, in which he had lost his temper by reason of her protests, and thrown her upon the pavement or otherwise chastised her to her injury, the Maniaci case would be a direct authority in favor of the master's liability. The same principle is supported more or less directly by the authorities which it cites. They all put the master's liability upon the ground that in the performance of those acts which can be done only by the use of its powers and under its direction, it is responsible for the conduct of the servant, even though, in the accomplishment of that object, he commits a willful tort. There is nothing

in any of them that implies the duty to regulate the gait of one who walks along the street for such purpose. Had economy indicated that the duty of delivering telegrams be united in the boy with the duty of delivering medicine for the drug store in which defendant's office was situated, a search of his pockets might disclose either telegrams or medicine, or both, but we do not think their presence would be of value to fix upon either druggist or telegraph company a liability for his want of circumspection in using the easement which was freely open to him for himself, despite the objections of either, or both.

We have already referred to the paucity of authority upon the liability of the master for the use by his servant of the public street. The most of us frequently send our servants to the post-office or the store, or, if we have no one regularly employed to do these errands, expend a nickel or a dime for a special messenger for such purposes. Traveling salesmen in the employ of commercial houses go from store to store and house to house in the pursuance of their calling. Boys engaged in this employment frequently encounter their juvenile enemies, and we, who employ them, do not think of worrying over our financial responsibility for the result. The youth who goes to the post-office with our letter on a Fourth of July morning may carry a bundle of fire crackers and distribute them freely along the route, or the festive drummer on a holiday occasion may fall over a slight and quiet traveler, or the boy who carries a parcel may, at the same time, try to control his boon companion, the bull pup, with a string. Many of us have seen painful accidents resulting from such conditions, but have seen no legal authority for holding the master liable in damages growing out of the rollicking movements of his servants on the street, even though his own business may have taken them to the very place at that very time, unless he instigates the wrong which caused the injury. Nor are we prepared to hold that a corporation is, in this respect, subject to a more stringent rule of liability than a natural person.

The judgment of the Circuit Court for the City of St. Louis is therefore reversed.

RAILEY, C., not sitting.

PER CURIAM. The foregoing opinion of BROWN, Commissioner, is adopted by the court in banc as the opinion of said court. All concur, except WOODSON, J.

NOTE.—*Negligence of Servant Colliding with Pedestrian on Street.*—As seen the instant case finds one way as to wife injured under circumstances wherein a subordinate appellate court in behalf of the husband for the same injury held the other way. Looking at the opinions in the two cases it seems to us the court in which the husband's case was decided has the better reasoning for its conclusion. We also must believe that the diligence of counsel for defendant in error must have been rewarded with more than one decision analagous in its facts.

There is one case cited in the note to the Ryan-Keane case as reported in L. R. A. (N. S.) p. 143, under the title Price v. Simon, 62 N. J. L. 153, 40 Atl. 689, 4 Am. Neg. Rep. 417, which seems closer than any one discussed.

This case shows that an iceman with tongs in hand collided with a child when he was hurrying from a house where he had delivered ice. It is true the injury was from the tongs, but that seems quite immaterial. The tongs were not his means of propulsion. They were merely held in his hands. The court said: "The servant ran into the public street, with an implement in his hands which would certainly inflict injury on anyone who came in contact with its sharp points. The infant plaintiff had an equal right with the servant to be there, and it was clearly a question for the jury whether the servant exercised reasonable care in the handling of the ice tongs, to avoid injury to the plaintiff. Whether he was swinging an ice tongs, or a drawn sword, in the street, would make no difference in the legal rule, except as to the degree of care that would be exacted of the servant."

It may be, that the court thought that if the servant was running recklessly along the street and the child was not touched by the tongs but merely upset and injured, there would be no liability, but essentially this does not appear from the opinion. It was a jury question whether he was exercising reasonable care or not.

But the court passes up Ryan v. Keane, 211 Mass. 543, 98 N. E. 590, 47 L. R. A. (N. S.) 142, by a distinction which the Price-Simon case rejects. It says in effect, that if the injury in the instant case had happened to a licensee on owner's premises it would have created liability, but not it it happened on the street. It was at all events a plain case of negligent jostle and in a place somewhat public in its nature. The court, speaking of the accident, said that if the servant "in hurrying to do his work in a busy hour in the morning, carelessly or wilfully jostled against and injured plaintiff, the defendants are liable for his act. The evidence does not show that the servant assaulted the plaintiff wilfully, or that he was actuated by ill-will or by a desire to carry out any purpose of his own." It is hard to sustain that case and not have affirmed the judgment in the instant case in favor of plaintiff—that is to say, there was enough in the instant case to make the question one for the jury.

In Mo. K. & T. Ry. Co., Tex. Civ. App., 67 S. W. 891, plaintiff was standing near a passenger train where he had gone to meet some friends. The brakeman of a train had gone to a restaurant and hurriedly returning to board a train just moving away he ran into plaintiff and he was thrown under the train; a recovery was sustained. There is no discussion, but it seemed to the court that one walking or hurrying or pranking on the street can commit an injury for

which there may be liability, and if he commits it in the scope of his employment the master is liable.

It seems to us that in the only two pedestrian cases found liability was upheld, and it cannot but be true that a master can be held, if a bicycle rider on the street injures another from negligence. So there is no such difference as the court in the instant case points out where his employee is proceeding on foot. The court says: "Nor was the defendant under any obligation to so restrain his (servant's) liberty of action, in the ordinary use of the public easement." Was this pranking and reckless rushing along an ordinary use of the public easement? Would it not be as well a liberty for one operating a bicycle on the street? The easement is for him on the street, just as for the foot passenger on the sidewalk. It might be thought a jury would not see any negligence in the act, but it does not seem true, that as a matter of law there was no actionable negligence.

CORRESPONDENCE

NO MEETING OF THE VIRGINIA BAR ASSOCIATION.

Editor Central Law Journal:

It has been decided by the executive committee of our association not to hold the annual meeting this year, because of conditions growing out of the war. Such a large proportion of our membership are actively engaged in matters of public interest connected with the war, that it was felt that a meeting would be very poorly attended and that attention would be distracted from more important matters. It is possible that a meeting may be held in the city of Richmond during the session of the legislature next winter, but this has not been determined

Yours very truly,

JNO. B. MINOR, *Secretary.*

Richmond, Va.

DANGERS OF OVER-ORGANIZATION.

Editor, Central Law Journal:

Dear Sir: The article by Mr. Robbins in your last issue, upon the dangers of over-organization, is a most excellent and timely one; it is applicable to every branch of human activity, and even existence, in our country to-day.

Organization, up to a certain point, can usually be made productive of good, but if carried further, it is decidedly harmful. In fact, over-organization—once it becomes general—will be the sure precursor of the downfall of our boasted democracy, and the substitution therefor of an absolute autocracy; the autocracy may not take the form of monarchy, but it will be just as bad for the people.

The trouble with us, even now, is that the idea has taken such a strong hold upon us, largely through paid advertising campaigns, and has so developed that it is about ready to "go to seed," resulting in all sorts of conditions unnecessarily destructive of individual excellence and individual freedom, and productive of unwise regulation and human "cog-wheel" effort.

The idea may well be attributed to that growing spirit of paternalism which is becoming stronger every day, and which (in itself) needs to be curbed. The theory of it is proper enough, but the unnecessary practice of it is injurious. Take one popular instance—the fixing of food standards: Milk, unregulated by law, will vary in quality from quite poor up to that of average quality and on up to the richest of the product; when a standard is fixed by law, it is set at such a low point as not to exclude the unadulterated product of about the poorest cow, and the result is that most of the higher quality product is watered down to or near the legal standard. Before regulation, the price of milk was about the same for all grades, and the consumer would soon learn which was the better milk and buy it; after regulation, the same price brought to the customer only the low standard of quality, and if he wanted that which he got before he would pay nearly twice as much for it; yet the cost of producing the milk was just the same before and after regulation.

The same principle applies to much of the quality, regulation and standardization; the best is not the standard, and cannot be, while its quality is generally reduced.

So, in over-organization, it is not the wisest or best service that will be secured, but the co-operating cog wheel average. In the learned professions this is not to their best interests, any more than it is wise for them, through organization, to seek to regulate matters with which they may come in contact, but as to which they are often, individually and collectively, not so trained as to be competent regulators.

Truly, too much organization, and its parent—paternalism—are present dangers to our democratic institutions.

Very truly yours,

W. A. MELCHER.

Philadelphia, Pa.

ITEMS OF PROFESSIONAL INTEREST.

JUDGES REMAINING IN SERVICE AFTER REACHING THE TIME FOR RETIREMENT.

Why is it that so many judges have remained on the bench so long after they have earned the right to retire? At the present time there are four Supreme Court judges who have served for more than fifteen years and six county court judges who have been on the bench over a quarter of a century. One reason, perhaps, for this attachment to judicial work is that it is very interesting. "The law dry? I deny it," exclaimed Baron Bramwell. "Of the four volumes of Blackstone's 'Commentaries,' three, to my mind, are most interesting." Many other famous judges have left on record their love of the law. The late Lord Coleridge was an exception. The letters he addressed to an American friend, which were published not long ago under the title of "Forty Years of Friendship," make it plain that he never possessed a liking for his profession. He goes, indeed, the length of saying that, while his work as an advocate was barely interesting, his work as a judge was positively repulsive. Lord Bowen, great lawyer as he was, held a somewhat similar view. "I simply hate law," he once observed to an intimate friend, adding, however, with characteristic wisdom, "a man may be a fool to choose a profession, but he must be an idiot to give it up." But Lord Coleridge and Lord Bowen had strong literary inclinations, and probably their dislike of the law was born of their love of literature. The great majority of judges have possessed a strong love of their profession, some even for the technical part of the law. It is reported, for instance, that Lord Wersleydale once apologized for his late arrival at a dinner party by informing his hostess that he could not tear himself away from a "beautiful demurrer." Others have found a fascination in the more human problems with which their judicial work has brought them intimately into touch. Mr. Justice Patteson found so much pleasure in his work on the bench that he was afraid that he might continue it after his increasing deafness made it expedient in the public interest that he should retire, and he exacted a promise from a friend—which was faithfully fulfilled—that he would tell him immediately he thought his impaired power of hearing unfitted him for his work. Are there, we wonder, any veterans on the bench in these days, whether in the supreme court or the county courts, who have intrusted such a mentor with the delicate task of detemining their length of service?—*The Law Journal*, London.

[Note.—When we think of the great lengths of judicial life of many of our supreme court justices, we wonder how they might look at the matter. None of the members of that court of long judicial careers, with the gravest of responsibilities, seems ever to have provoked the thought, far less its open expression, that he lagged superfluous on the stage, or that he had abated from his pristine vigor or that the light of joy in his labors was dimmed with his dimming eyes. What a tremendous argument against Oslerization, so far as intellectual life is concerned, is the history of our great tribunal! The way they treat a judicial question suggests what Sir Lucius O'Trigger said of the duel in the dusk of the evening, "What a beautiful sword light there is for the fight," an observation not very highly appreciated by Bob Acres, his principal.—Editor, Cent. L. J.]

REPORT OF THE MEETING OF THE NEW HAMPSHIRE BAR ASSOCIATION.

There was a large attendance at the annual meeting of the Bar Association of the State of New Hampshire, held at the Belknap County Courthouse in Laconia, June 30th. The program included an address by the president of the association, Col. Stephen S. Jewett, who, after welcoming the members to Laconia, spoke briefly on "Observations on the Practice of Law in New Hampshire." At the close of his address, Col. Jewett presented Prof. Roscoe Pound, Dean of Harvard Law School, who gave an eloquent address upon the subject, "The Revival of Personal Government."

The members were guests of the Laconia lawyers for an automobile ride to points of interest about the city, and on Sunday morning enjoyed a trip around Lake Winnipesankee on the Steamer "Gov. Endicott."

The annual banquet of the association was held Saturday evening at the Laconia Tavern.

The president for the coming year is George F. Morris, of Lancaster, and the secretary and treasurer, Arthur H. Chase, of Concord, was re-elected.

REPORT OF THE MEETING OF THE ARKANSAS BAR ASSOCIATION.

The twentieth annual meeting of the Arkansas Bar Association was held at Hot Springs, May 31st and June 1st, 1917. The meeting was unusual in that the discussions were confined principally to one subject, to-wit, proposals for the new constitution that

is to be adopted in Arkansas this year, the general subject being "Modern Proposals for Increasing the Efficiency of the Various Departments of Government."

The newly elected officers for the ensuing year are: President, Thomas C. McRae, Prescott; Secretary, Roscoe R. Lynn, Little Rock.

BOOK REVIEW.

ARGENTINA CIVIL CODE.

This volume is a translation from Spanish to English of the Constitution of Argentina, its Civil Code and Amendatory Laws by Mr. Frank L. Joannini as revised by Messrs. Phanor J. Eder, Robert J. Kerr and Joseph Wheless, all constituting an official publication of the Comparative Law Bureau of the American Bar Association.

This Constitution was adopted in September, 1860, and is the product of efforts beginning in 1853 to reduce to form hundreds of enactments observed by a sort of common consent before that time, so that the people might have a body of enactment of recognized authority.

The work thus presented is of more than mere literary interest to the people of the United States. It shows the civilization of our great southern neighbor, and while civil law, rather than common law, terms are employed, yet there is not so very great diversity on this account as might be supposed.

The work is in attractive form and comes from the establishment of Boston Book Company, Boston, Mass., 1917.

BOOKS RECEIVED.

Thomas Welburn Hughes, LL. D., Dean Washburn College Law School; member of the law faculty of the University of Michigan six years; member of the law faculty of the University of Illinois twelve years; member of the law faculty of Louisiana State University two years; Dean of the College of Law of the University of Florida three years. Author of Hughes on Evidence, Hughes on Criminal Law and Criminal Pleading and Procedure, etc. Price, cloth, $3.75; leather, $4.75; 1917. Topeka, Kan. F. M. Stevens & Sons. Review will follow.

HUMOR OF THE LAW.

"'Deed no, sah, I can't jine no army."
"But your country needs you, Rastus."
"Can't help dat. It's onpossible."
"Why impossible, Rastus?"
"Well, you see, my ol' woman has been ovah to de police co't an' put me unner bonds to keep de peace. No, sah, I can't do no fighting, nohow."

A BELATED CONSCIENCE.

"Say, Rastus, you black rascal!
I thought you were in jail
For stealing old Maria's pig.
Did they let you out on bail?"

"Naw, sah! Mars Fred'rick 'fended me,
Come clear by de tightes' pinch.
But he had dat jury weepin'
Same ez er moaner's bench.

"Mars Fred, he pictur'd me so gran'
I felt jes' lak er dawg;
Ef I'd kno'd I's all dat hones'
I wouldn't er stole dat hawg."

—Docket.

Once upon a time an unfortunate traveler fell off from the top shelf of a sleeping car and dented his left kneepan quite a good deal. He forthwith hied him, limping and lamenting, to a lawyer who was reputed to be so honest that he preferred to tell the truth even when a lie would do just as well, and would not accept a retainer from a client unless the latter had a just cause for action. He also had plenty of time to practice on the violin.

"I choose to sue the soulless corporation for $10,000 damages," quoth the injured man, "both because I really am damaged fully $16 worth and also because $10,000 is the only sum for which anybody ever sues a corporation."

"Pish, likewise tush!" returned the attorney, reaching out for his faithful fiddle. "You would but waste your time and mine, for the counsel for the defense would make you a laughing stock and cause your dreams of avarice to turn to ashes in your mouth, by proving on your own testimony that you were lame from your berth."

Ah, was he not a queer lawyer, thus to carelessly throw away an opportunity for a fee, merely to make a sad witticism?—Kansas City Star.

WEEKLY DIGEST

Weekly Digest of ALL the Important Opinions of ALL the State and Territorial Courts of Last Resort and of ALL the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co. St. Paul, Minn.

1. **Adverse Possession**—Quieting Title.—In suit to quiet title, defendants are not estopped to claim title by adverse possession, because they acquiesced in change of a boundary line fence for several years while such dividing line was in litigation and such change of location did not prejudice plaintiffs.—Jackman v. Germain, Wash., 165 Pac. 78.

2. **Assignments**—Parties.—Though plaintiff has assigned to his attorneys an interest in his cause of action for personal injury, they need not be made formal parties plaintiff; they filing a pleading that they are representing plaintiff on the trial, and agree to be bound by any judgment as though formal parties.—Missouri, K. & T. Ry. Co. v. Hicks, Tex., 194 S. W. 1145.

3. **Associations**—Expulsion of Members. — Where voluntary association under its rules expels a member, such member must exhaust the remedies provided by the association itself through its constitution and by-laws before applying to a court of equity for relief.—Brown v. Harris County Medical Soc., Tex., 194 S. W. 1179.

4. **Attorney and Client** — Disbarment. — Whether in a particular case a summary proceeding shall be entertained against an attorney to compel his return of money received from a client, or the client put to his remedy by action at law, is in the trial court's discretion.—Charest v. Bishop, Minn., 162 N. W. 1063.

5.——Quantum Meruit.—Where attorney's services are performed under entire contract which has not been completely performed, he may sue upon a quantum meruit and recover the reasonable value of the services rendered, subject to set-off for breach of contract.—Hamilton v. Blakeney, Okl., 165 Pac. 141.

6.——Personal Liability.—Attorney at law, who, acting for his client, applies to a title insurance company and himself signs agreement with company, is personally bound to pay company's fees.—Title Guaranty & Trust Co. v. Maloney, N. Y., 165 N. Y. S. 280.

7. **Banks and Banking**—Change to State Bank.—Agreement between stockholders of national bank desired to be converted into state bank, understood by state auditor and his agent, held not to authorize granting to state bank of certificate authorizing it to commence business as bank without compliance with statutory requirement of capital paid in cash dedicated to business and in possession of officers.—Golden v. Cervenka, Ill., 116 N. E. 273.

8.——Debtor and Creditor.—Deposits are not the property of the depositors, but of the bank receiving them; the relation of a bank and its depositors being that of debtor and creditor, so that deposits and investments are equally assets of the bank.—Anderson v. Farmers' Loan & Trust Co., U. S. C. C. A., 241 F. 322.

9.——Notice.—Personal check of a bank officer drawn upon the bank and accepted in payment of his note does not charge holder with notice that there is an attempt to misappropriate bank's funds.—Pope v. Ramsey County State Bank, Minn., 162 N. W. 1051.

10. **Bankruptcy** — Compromise.—Bankr. Act, §§ 2, 38, 47a(2), empower the referee to approve a compromise between the trustee and the bankrupt, whereby the trustee accepted a less amount than the bankrupt was ordered by the court to pay as the amount the court found the bankrupt was concealing, where such compromise is for the best interests of the estate.—In re Goldman, U. S. D. C., 241 Fed. 385.

11.——Dismissal.—Upon dismissal of involuntary petition, court held without inherent power to assess compensation of trustee and counsel against petitioning creditors, in absence of fraud or bad faith.—In re National Carbon Co., U. S. C. C. A., 241 Fed. 330.

12.——Compensation.—A resolution of a bankrupt corporation, fixing the compensation of its president, held not to entitle the president to a preference, under Bankr. Act July 1, 1898, § 64, as amended by Act June 15, 1906, though he also rendered services as clerk and driver of a wagon.—In re Eagle Ice & Coal Co., U. S. D. C., 241 Fed. 393.

13.——Final Order.—An order that, if the alleged bankrupt shall appear and plead to the petition within five days, the adjudication will be set aside and the motion to quash service of subpoena granted, being conditional, was not final, and not appealable.—In re Sutter Hotel Co., U. S. C. C. A., 241 F. 367.

14.——Law of State.—In proceedings to reclaim property from trustee in bankruptcy, the question whether the contract under which the bankrupt held the property was a bailment for hire, or a sale, conditional or absolute, must be determined by the law of the state in which it was made.—In re Eagle Ice & Coal Co., U. S. D. C., 241 Fed. 393.

15.——Partnership.—Fact that bank cashier and bookkeeper were members of a partnership will not impute knowledge of partnership's dissolution to the bank so as to defeat recovery from other partners for money borrowed on firm note after dissolution.—Citizens' Trust Co. v. Tindle, Mo., 194 S. W. 1066.

16. **Bills and Notes**—Indorsement.—One taking a check payable to corporation, must suffer the consequences, if agent indorsing it is without authority, unless corporation is negligent.—Standard Steam Specialty Co. v. Corn Exchange Bank, N. Y., 116 N. E. 386, 220 N. Y. 478.

17. **Brokers** — Commission. — Though purchaser for realty by broker was ready and willing to make first payment called for by contract when due, his readiness and willingness was not sufficient, he not having made payment nor offered to do so, to entitle broker to commission to be paid from such first payment.—Stelson v. Haigler, Colo., 165 Pac. 265.

18. **Carriers of Goods**—Delivery.—A seller's delivery to a carrier of goods consigned to himself was not a delivery to the purchaser, although the delivery was by arrangement between both the parties that the bill of lading should be sent with draft attached and the purchasers notified.—Spedding v. Griggs, Fuller & Co., Mich., 162 N. W. 956.

19. **Carriers of Live Stock**—Delay.—In action for damage to stock shipment caused by carrier's delay, instructions as to damages should have defined shrinkage for which plaintiff could recover; some shrinkage naturally occurring on such a shipment.—Baker v. Bush, Mo., 194 S. W. 1061.

20. **Carriers of Passengers** — Baggage.—While a sleeping car company is not an insurer of baggage or other personal effects of passenger, it is bound to exercise reasonable care over same while a passenger is asleep, and is liable for loss thereof arising from negligence.—Goldstein v. Pullman Co., N. Y., 116 N. E. 376, 220 N. Y. 549.

21. **Commerce**—Employees.—Where a railroad station employee was killed by a train carrying interstate passengers and mail while attempting to pass in front of it to secure mail from it intended for his station, the parties were engaged in interstate commerce within federal Employers' Liability Act.—Lynch v. Boston & M. R. R., Mass., 116 N. E. 401.

22.——Employees.—Railway section hand, engaged in inspecting and repairing track used in interstate commerce, as well as removing old rails from the side thereof, held engaged in interstate commerce.—Denver & R. G. R. R. Co. v. Da Vella, Colo., 165 Pac. 254.

23.——Employees.—Where plaintiff employee was injured while repairing a roundhouse wall of defendant railroad, a portion of which fell upon him, plaintiff was not engaged in interstate commerce within the federal Employers' Liability Act.—Castonguay v. Grand Trunk Ry., Vt., 100 Atl. 908.

24. **Carriers of Live Stock**—Notice of Damage.—Provision in contract for interstate carriage of live stock making written notice of damage to carrier within a day after delivery at destination a condition precedent to recovery is valid, and failure to give such notice bars an action for damages.—Chicago, R. I. & P. Ry. Co. v. Gray, Okla., 165 Pac. 157.

25. **Constitutional Law**—Sale of Narcotics.—In a prosecution for the violation of the Harrison Drug Act, regulating the sale of narcotics, where no question of seizure was involved, defendant cannot attack the validity of that act because of its provisions authorizing searches and seizures.—Thurston v. United States, U. S. C. C. A., 241 F. 335.

26. **Corporations**—Foreign Corporation.—Domestic corporation is not authorized to hold stock in another corporation, and foreign corporation can exercise no powers in Illinois which could not be lawfully exercised by domestic corporation, though licensed to do business in Illinois, and to deal in corporate securities.—Golden v. Cervenka, Ill., 116 N. E. 273.

27.——Registration of Transfers.—Code 1907, § 3471, providing for registration of corporate stock transfers, contemplates only protection of subsequent purchasers without notice of prior equities, and when such equities have been created by transfer, hypothecation, mortgage, or lien, corporation is bound to regard them from time it receives notice of existence.—Bank of Florala v. American Nat. Bank of Pensacola, Ala., 75 So. 310.

28.——Labor Union.—In suit to enjoin labor union members from advertising plaintiff's theater as unfair, a finding that word "unfair" is practically synonymous with "scab" among labor men, held sustained by testimony.—Martin v. Francke, Mass., 116 N. E. 404.

29. **Damages.**—Penalty.—Where contract for exchange of lands provided for liquidated damages for breach, and where damages from breach of some other stipulations might be readily determined and would be inconsiderable as compared with such sum, it would be treated as a penalty.—Johnson v. Dittes, Minn., 162 N. W. 1078.

30. **Death**—Beneficiary.—Under federal Employers' Liability Act, providing that damages shall be paid for benefit of surviving spouse and children, parents and dependent next of kin, a parent who might reasonably anticipate aid from deceased is entitled to share in damages, although no aid had actually been received from deceased.—Tobin v. Bruce, S. D., 162 N. W. 933.

31. **Deeds**—Estoppel.—Where possessor under title bond was defeated in unlawful entry and detainer by stranger claiming under title hostile to vendor, and leased land from vendor paying no purchase money, and after deed for unsold land, repurchased from grantee, parties to deed will be held to have construed it as passing title to land unsold.—King v. King, W. Va., 92 S. E. 657.

32. **Divorce** — Evidence.—Wife's charge of nonsupport as specification of extreme cruelty is not supported; husband's income being derived wholly from his labor, and she being supported generally as well as most people in similar circumstances.—Wall v. Wall, Mich., 162 N. W. 1001.

33. **Druggist**—Police Power.—The state or other proper authorities, under police power, may regulate or prohibit the sale of liquors or poisons, or articles that may be deleterious to the health of a community, and may prescribe the qualifications of persons who may deal therein. —City of Seattle v. Gibson, Wash., 165 Pac. 109.

34. **Ejectment** — Constructive Notice.— Such constructive notice of poor title as might be raised from the condition of the records will not deprive an occupying claimant, when dispossessed by a better title, of the right to compensation for improvements given by Rev. St. 1909, § 2401, to one making improvements in good faith without notice of adverse title.—Eisberg v. Phillips, Mo., 194 S. W. 1075.

35. **Eminent Domain**—Due Process of Law.—Necessary damages by county authorities in repairing highway without negligence to poles of telephone and telegraph company erected under franchise, held not taking or damaging property without compensation within meaning of Const. art. 1, § 16.—Granger Telephone & Telegraph Co. v. Sloan Bros., Wash., 165 Pac. 102.

36.——Evidence.—In condemnation proceedings, admissibility of evidence of price paid for land in same vicinity is in discretion of trial court, and will be reviewed only for manifest abuse.—In re Northlake Ave., Wash., 165 Pac. 113.

37.——Injunction.—Abutting property owners, seeking injunction, held remitted to their action for damages because of delay in taking any action respecting vacation of streets and grant to railroad company of right to use them, pursuant to which defendant made permanent improvements.—Hall v. St. Louis, I. M. & S. Ry. Co., Ark., 194 S. W. 1031

38. **Estoppel**—Evidence.—Where three conveyed land, and grantee's successor in title brings ejectment against two of grantors, they cannot show that other grantor was a minor when deed was executed, or that they were not sole owners of land conveyed, as against express recitals to that effect in their deed.—Tris Napier Co. v. Daniels, Ga., 92 S. E. 650.

39. **Executors and Administrators**—Embarking in Business.—Trade creditors who furnish decedent's business with merchandise in violation of rule that personal representative cannot purchase additional merchandise to keep stock intact, though authorized to continue business temporarily to close it out, are restricted to that part of state assets embarked in business to which they contributed unless rights are enlarged by estoppel.—In re Ennis' Estate, Wash., 165 Pac. 119.

40.——Set-Off.—Where claimant induced administratrix not to present a set-off against his claim, so that her right is now barred, equity will prevent collection of full amount of claim and allow administratrix to enforce her set-off against claimant.—Cutting's Adm'x v. Cutting, Vt., 100 Atl. 911.

41. **Fixtures**—Mortgage.—Where seller retained a chattel mortgage on elevator which purchaser incorporated in a building he was constructing under contract, and owner of building completed it upon contractor's default, the mortgagee could not recover elevator or its purchase price from such owner.—First Nat. Bank v. Lyon-Gray Lumber Co., Tex., 194 S. W. 1146.

42.——Severance.—Negotiations by a homesteader for sale of his improvements together with a relinquishment of his possessory right to land as homesteader did not constitute a constructive severance of house from realty which would entitle a creditor to replevin house as personal property.—Enterprise Mercantile & Milling Co. v. Cunningham, Ore., 165 Pac. 224.

43. **Fraudulent Conveyances** — Badge of Fraud.—A transfer by a debtor in anticipation of a suit against him or while it is pending against him is a badge of fraud.—Allen v. Lignon, Ky., 194 S. W. 1050.

44.——Chattel Mortgage.—Although a chattel mortgage may be valid on its face, it may be rendered invalid by a subsequent agreement, and though the agreement be in writing, it will then be considered as having entered into the mortgage and formed a part thereof, and if it would have been void in the first instance, it would be void in the second.—Gray & Dudley Hardware Co. v. Guthrie, Ala., 75 So. 318.

45. **Frauds, Statute of**—Guaranty.—A guaranty of rent executed in another state attached to the lease, being in writing, can be used as evidence in Minnesota.—Halloran v. Jacob Schmidt Brewing Co., Minn., 162 N. W. 1082.

46. **Garnishment** — Splitting Actions. — The rule against splitting causes of action applies only where holder sues more than once on single cause, or, without defendant's consent, assigns part only of such cause of action, and is inapplicable to garnishment of an account previously assigned by defendant debtor.—O'Barr v. Turner, Ala., 75 So. 271.

47. **Gifts**—Delivery of Check.—A gift cannot be effected by delivery of an ordinary bank check.—Provident Institution for Savings in Jersey City v. Sisters of the Poor of St. Francis, N. J., 100 Atl. 894.

48.——Inter Vivos.—An instrument, leaving maker's property to his wife "in case anything should happen to me," does not constitute a gift inter vivos.—In re Reh's Estate, Mich., 162 N. W. 978.

49. **Highways** — Laws of Road.—Although Rem. & Bal. Code, § 5569, provided that vehicle passing another in same direction should pass to right, it is not negligence per se to drive on wrong side of road in passing another vehicle.—Hartley v. Lasater, Wash., 165 Pac. 106.

50.——Negligence.—An automobile driver who collided with a bicycle rider cannot escape liability on the ground of the other's negligence in failing to keep a lookout, where the rider was going west on the north half of the traveled part of the highway, and the accident would not have occurred had the automobile driver given half the highway, as required by Pol. Code, § 1766.—Schnabel v. Kafer, S. D., 162 N. W. 935.

51. **Husband and Wife**—Estoppel.—Wife permitting husband to use her separate personal property so as to induce a purchaser's belief that husband is owner, and who accepts benefits of his sale, with knowledge, is estopped from asserting her title against purchaser.—Kyle v. Huddlestun, W. Va., 92 S. E. 679.

52.——Estoppel.—That a wife intrusted to her husband for recording a deed made to her alone, which, without her knowledge, he changed before recording by inserting his name also as grantee, and that she with her husband mortgaged the deeded property, making no representations, did not estop her from suing to cancel such mortgage as given for her husband's debt.—Bank of Coffee Springs v. Austin, Ala., 75 So. 301.

53.——Necessaries.—Where wife pays for necessaries as a contribution toward family expenses, without expecting reimbursement, she cannot recover the amount from her husband's estate; but where she paid expecting husband's repayment, she may recover.—In re Kosanke's Estate, Minn., 162 N. W. 1060.

54.——Sale of Realty.—Where widow and three children treated realty as community property, and daughter's undivided interest was sold to satisfy judgment, and widow thereafter sold all real estate to son, the sale divested her of all title in the property, however acquired.—Hayne v. Lisso, La., 75 So. 235.

55. **Injunction**—Covenant.—Injunction pendente lite will be granted to enforce a covenant not to enter the service of another in a contract for personal services, where services are unique, involve trade secrets, etc., and contract is not in restraint of trade or inequitable, and there is no adequate remedy at law.—Clark Paper & Mfg. Co. v. Stenacker, N. Y., 165 N. Y. S. 367.

56. **Innkeepers**—Negligence.—Evidence that plaintiff hung up his overcoat near a lunch counter, that signs notified patrons that defendant was not responsible for their property, and that overcoat disappeared while plaintiff was eating, does not establish defendant's negligence.—Schleef v. Foodcraft Co., N. Y., 165 N. Y. S. 209.

57. **Insurance**—Employers' Liability.—Where employer's liability policy did not refer to application and did not recite that it was issued in consideration of the representations made in the application, such application could not be considered in construing the contract.—Maryland Casualty Co. v. W. C. Robertson & Co., Tex., 194 S. W. 1140.

58.——Tontine Policy.—The rights of holders of life policies, which contained tontine features, are measured by contract of each policy holder with insurer.—Eberhard v. Northwestern Mut. Life Ins. Co., U. S. C. C. A., 241 Fed. 353.

59.——Homicide.—In an action on an insurance policy, allegations that beneficiary discharged a loaded pistol at insured and killed him, and therefore could not recover on the policy, do not preclude recovery, since the killing may not have been unlawful, and last allegation is merely the pleader's conclusion.—Drown v. New Amsterdam Casualty Co., Cal., 165 Pac. 5.

60.——Presumption.—Where a casualty policy different from that applied for has been fradulently issued, the insured, without reading it, may assume that it conforms to the application.—Hammond v. Western Casualty & Guaranty Ins. Co., Kan., 165 Pac. 291.

61. **Landlord and Tenant**—Tenancy at Will.—A tenant at will of the owner of real estate who is given a lease for life by a subsequent grantee of the owner need not to establish her title to such life interest establish a surrender to the original owner, since her claim is not adverse, but consistent with the owner's claim.—Lyon Co. v. Crane, Ala., 75 So. 366.

62.——Title.—Tenant by disclaimer of tenure under landlord, with notice thereof to him, may make his possession adverse to landlord and thus acquire title in himself or establish it in a stranger under whom he afterwards holds by adverse possession.—King v. King, W. Va., 92 S. E. 657.

63. **Libel and Slander**—Actionable Per Se.—Accusing a person of being a thief is actionable per se.—Valley Dry Goods Co. v. Buford, Miss., 75 So. 252.

64.——Privilege.—Slanderous words spoken by a stockholder to directors and other stockholders of a corporation are not absolutely privileged, but the privilege is a qualified one.—Siever v. Coffman, W. Va., 92 S. E. 669.

65. **Master and Servant**—Accident.—Employee's injury while going to answer a telephone call in another part of the factory, held to be an "accident arising out of and in the course of the employment."—Holland-St. Louis Sugar Co. v. Shraluka, Ind., 116 N. E. 330.

66.——Assumption of Risk.—A car repairer assumed the risk of injury from the falling on him of a defective draw-bar in a bad-order car, which defect was not noted on the bad-order tag attached to the car by car inspector.—Sims v. Minneapolis, St. P. & S. S. M. Ry. Co., Mich., 162 N. W. 988.

67.——Assumption of Risk.—Where a servant carried a heavy flange pipe for a short distance without specific direction, and later was ordered by the foreman to carry it again, and its weight crushed him, he could not recover, since he was the best judge of his own strength.—Cumberland Pipe Line Co. v. Strong, Ky., 194 S. W. 1036.

68.——Assumption of Risk.—Where machinery is in a servant's entire charge, he assumes risk due to his failure to properly repair or operate it.—Cincinnati, N. O. & T. P. Ry. Co. v. York, Ky., 194 S. W. 1034.

69.——Compensation.—Theory of Workmen's Compensation Law is not indemnity for physical impairment as such, but compensation for disability to work based on average weekly wage.—Marhoffer v. Marhoffer, N. Y., 116 N. E. 379, 220 N. Y. 543.

70.——Course of Employment.—Employee in millinery department who fainted while quarreling with her boss in regard to her work could not recover under Workmen's Compensation Law for injuries due to co-employe throwing ammonia into her face thinking it was water.—Saenger v. Locke, N. Y., 116 N. E. 367, 220 N. Y. 556.

71.——Hazardous Employment.—Making hats and feathers in the millinery business is "hazardous employment" within meaning of Workmen's Compensation Law.—Saenger v. Locke, N. Y., 116 N. E. 367, 220 N. Y. 556.

72.——Hazardous Employment.—A building superintendent, whose duty it was to make ordinary repairs, who mounted a stepladder and while at work fell, was not engaged in a "hazardous employment" carried on by the employer for pecuniary gain within Workmen's Compensation Law.—Schmidt v. Berger, N. Y., 116 N. E. 382, 221 N. Y. 26.

73.——Husband and Wife.—Since under Rev. Laws, c. 153, §§ 2, 4, a married woman cannot contract with her husband, a wife cannot be an "employee" of her husband under Workmen's Compensation Act, pt. 5, § 2.—In re Humphrey, Mass., 116 N. E. 412.

74.——Workmen's Compensation Act.—Under Workmen's Compensation Act, § 14, and Civ. Code, §§ 197, 1965, an unmarried minor son, living with and supported by his parents and doing such work as directed by father, without any agreement as to wages, is not an "employee," entitling father to reimbursement from insurance carrier on policy protecting him against claims on the part of his employees.—Aetna Life Ins. Co. v. Industrial Accident Commission, Cal., 165 Pac. 15.

75. **Mandamus**—Illegal Fees.—Mandamus is a proper remedy to compel a district court to act upon an accusation charging a county commissioner with collecting illegal fees, brought under Revised Codes, § 9006, relating to removal of public officers by summary proceedings.—State v. District Court of Fifth Judicial Dist. in and for Madison County, Mont., 165 Pac. 294.

76.——Pendency of Action.—Pendency of election contest between candidates for election to vacancy in office of commissioner of county court, termination of which might incidentally affect right of one claiming to be elected to a full-term, term is not impediment to his right to mandamus to be inducted into office.—Griffith v. Mercer County Court, W. Va., 92 S. E. 676.

77. **Municipal Corporations**—Automobiles.—A motorcycle policeman's testimony regarding speed of defendant's automobile according to tested speedometer attached to his motorcycle, held to sustain a conviction for automobile speeding.—City of Spokane v. Knight, Wash., 165 Pac. 105.

78.——Cause of Action.—Where under Pub. Loc. Laws, 1913, c. 197, requiring highway commission and board of aldermen of Franklin to regrade and open street when required by the

public interests, a new street on side of hill higher up was graded on side of street opposite plaintiff's lot, but plaintiff was left use of old street, he had no cause of action.—Stiles v. Town of Franklin, N. C., 92 S. E. 599.

79.——Lease.—Where an auditorium in a building erected for municipal purposes is no longer needed for public use and its lease will lighten taxation, the municipality may lease it for private use.—Anderson v. City of Montevideo, Minn., 162 N. W. 1073.

80.——Licensee.—Employee of contractor to repair machinery in city's waterworks when on the premises is not a mere licensee, but an invitee, to whom it owes a duty as to safe condition of steps which he must use.—Flutmus v. City of Newport, Ky., 194 S. W. 1039.

81.——Vacating Streets.—Plaintiffs, owners of corner lot, held not injured by vacation of alley on petition of church owning rest of block, and not entitled to maintain suit to restrain vacation merely to obtain exorbitant price for their property.—Swanteck v. City of Detroit, Mich., 162 N. W. 1020.

82. **Navigable Waters**—Riparian Rights.—A deed of nonriparian land, consisting of grantor's entire property in that locality, "except that previously conveyed," does not include riparian rights abutting adjoining land on navigable stream which same grantor had previously conveyed to another, although such previous deed may not have conveyed any riparian rights.—Archer v. Southern Ry. Co. in Mississippi, Miss., 75 So. 251.

83. **Physicians and Surgeons**—Diligence.—Where two physicians have been individually engaged, each is answerable, not only for his own conduct, but for unlawful acts or omissions of the other, which, exercising reasonable diligence, he should have observed.—Wynne v. Harvey, Wash., 165 Pac. 67.

84.——Expert Testimony.—The jury must be guided by expert testimony in determining whether a physician exercised such care and skill as his employment required; and unless a standard is established by testimony of physicians they have no standard, and the case for malpractice must fail.—Norkett v. Martin, Colo., 165 Pac. 256.

85.——Pleading and Practice Demurrer.—An employee's personal injury complaint, alleging defendant's incorporation, but not nature of its business, does not establish that parties are subject to Workmen's Compensation Act, so that a demurrer thereto does not present question whether such act prevents plaintiff from maintaining a common-law damage action.—Nilsen v. American Bridge Co., N. Y., 116 N. E. 383, 221 N. Y. 12.

86. **Railroads**—Negligence.—Defendant railroad's employees may assume that municipal ordinance prohibiting running at large of animals will be obeyed, and are not negligent in failing to keep a lookout for animals on track at places in municipality not required to be fenced.—Kansas City, M. & O. Ry. Co. v. Trammell, Tex., 194 S. W. 1130.

87.——Ordinance.—In action for injury to truck at a railroad crossing, where street railroad tracks also crossed, plaintiff could avail herself of the protection of an ordinance requiring railroad trains to come to a full stop at street railroad crossings.—Illinois Cent. R. Co. v. Camp, Ala., 75 So. 290.

88. **Replevin**—Judgment.—In claim and delivery action, a verdict that plaintiff was entitled to immediate possession, concluding, "and in case such possession cannot be had we assess her damages at $75," was sufficient to support judgment for plaintiff.—Svendsen v. Ketchmark, S. D., 162 N. W. 932.

89. **Sales**—Rescission.—Where tractor was purchased under written agreement making no representations as to fuel, and buyer signed a receipt reiterating original contract terms after use of distillate as fuel had proved unsatisfactory, he cannot rescind because seller's agent, before contract was signed, stated tractor could use such fuel.—Emerson-Brantingham Implement Co. v. Wood, Colo., 165 Pac. 263.

90.——Warranty.—Where buyer is induced by false representation of seller to return engine which has proved not to be as warranted to seller as agent for manufacturer, seller is estopped, in action for purchase money paid, to question return as compliance with contract.—O'Rear v. Walker, Ala., 75 So. 353.

91. **Specific Performances**—Parol Agreement.—A parol agreement between tenants in common for partition, when carried out by taking exclusive possession in severalty according to the agreement, may be enforced.—Reed v. Mathewson, Ga., 92 S. E. 632.

92. **Street Railroads**—Instructions.—In an action for injuries in collision with a street car while crossing the track, where there was no evidence that motorman knew that plaintiff was in danger, or, after knowing it, omitted to do anything which could have avoided the accident, there was no error in refusing to submit question of gross negligence.—Simon v. Detroit United Ry., Mich., 162 N. W. 1012.

93. **Trusts**—Active Trust.—Where certain members of a farmers' union directed union to hold stock in warehouse corporation for benefit of such members contributing to its purchase and collect and disburse dividends accruing therefrom among them, active trust was created in trustee.—Teal v. Pleasant Grove Local Union No. 204, Farmers' Educational & Co-operative Union of America, Ala., 75 So. 335.

94.——Appointment.—A deed of trust because of its creator's debts and drunkenness can be revoked only in the manner provided by it; appointment by him of new uses with the trustees's consent, with petition to the court's discretion to cancel it, if the trustee refuses consent; and his drunkenness continuing the court properly refuses cancellation.—Downs v. Security Trust Co. of Lexington, Ky., 194 S. W. 1041.

95.——Mingling Funds.—Although generally where the trustee is guilty of gross neglect or fraud, or mingles the money with his own, he should be charged with interest at the legal rate, with annual rests, and, if he is guilty of mere neglect, with simple interest only, this rule is subject to exceptions, and the real question is what the equities of the particular case demand.—Backus v. Crane, N. J., 100 Atl. 900.

96. **Vendor and Purchaser**—Contract.—Where a contract concerning sale of land specifically described land and provided for a conveyance by warranty deed, land and not title acquired by vendor under a deed was subject-matter of contract.—Ickler v. Mullen, Mich., 162 N. W. 954.

97.——Evidence.—In action on note for the price of land, under plea of general issue with notice of special defenses of fraud and want of consideration, evidence that note was not paid because deed did not accompany it, according to agreement, when forwarded for payment, held inadmissible.—Bishop v. Dodge, Mich., 162 N. W. 1002.

98. **War**—Alien Enemy.—In view of tolerant character of President's proclamation declaring existence of state of war with Germany, suit for injunction by individual complainant, subject of Germany, resident of the United States, who has taken out first papers, and by German corporation, against persons charged with having deliberately set about to wreck New Jersey corporation wherein complainants held stock, will not be stayed on ground of alien enemy.—Posselt v. D'Espard, N. J., 100 Atl. 893.

99. **Wills**—Designation of Beneficiary.—Although there was no evidence that a claimant was generally known as "Mrs. M.," it was sufficient to show the testator's meaning, if there was evidence that he always called her "Mrs. M."—Moseley v. Goodman, Tenn., 195 S. W. 590.

100.——Construction.—Where will bequeathed to wife "absolutely (as long as she stays my widow) all my personal property" and funds, and "in fee simple all the real estate," and provided that, if the wife should marry again or die, the property should go to the children in equal parts, the word "property" necessarily referred to personalty only.—Johnson v. Mansfield, Ky., 195 S. W. 453.